BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

As the result of a grade crossing fatality petitioners (as defendants below) were charged with negligence. They pleaded the general issue.

The Supreme Court of Florida on an appeal from judgment in favor of the plaintiff (respondent here) found facts specifically disclosing that the plea of "not guilty" had been sustained. Nevertheless, in the face of recited facts clearly absolving petitioners of any liability, the Florida Court affirmed the judgment. In doing so it infringed upon petitioners' constitutional rights.

The Fourteenth Amendment to the Constitution of the United States has its roots in the fundamental concept that all men are equal in the eyes of the law and are entitled to justice administered upon a fair and impartial basis. The construction and application of the Amendment by the courts leaves no doubt that it was designed to prevent deprivation of life, liberty or property by not only the executive and legislative branches of the Government but also, and with equal force, similar infringements by the judiciary.[5] It is likewise clear that this constitutional inhibition applies not only to wrongs patent but equally so to wrongs which though not so readily apparent are, nevertheless, by their concealment[6] certainly as vicious and probably more detrimental to our system of government.

Many corrections of patent wrongs appear in the printed reports and precedents for actions which approach from

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[5] "The prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities * * *" *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U. S. 226, 233, 17 S. Ct. 581, 583, 41 L. ed. 979; *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565.

[6] *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220.

that direction are voluminous. For example, the Amendment, in its prohibition against denying to any person "equal protection of the laws," extends to corporate as well as natural persons,[7] to resident aliens as well as natural citizens,[8] and to colored citizens as well as white citizens.[9] It provides against unequal taxation.[10] The subjection of the liberty and property of a defendant to a court, the judge of which has a direct, substantial pecuniary interest against him is a denial of due process under the Amendment.[11] When the state takes a person into custody for trial for crime, the Constitution of the United States compels the state to afford him protection while in confinement, the bringing of him into court, the assembling of the jury, the charge, the seclusion of the jury from outside interference, the return of the verdict, the passing of judgment, the freeing or condemning him according to the judgment, and, if found guilty, allowing him an appeal, suspending execution of sentence meanwhile.[12]

When a litigant invokes the Amendment for the correction of a concealed infringement (so characterized for lack of a better term), however, he finds himself in a land more or less barren of decided cases. But this should not be and is not a barrier to relief. As was said by the Court of Appeals of New York in *Kujek* v. *Goldman*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 A. S. R. 670:

> "While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because

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[7] *Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517, 53 S. Ct. 481, 77 L. ed. 929, 85 A. L. R. 699.

[8] *Terrace* v. *Thompson*, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255.

[9] *Buchanan* v. *Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149.

[10] *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393, 48 S. Ct. 180, 72 L. ed. 329.

[11] *Tumey* v. *State of Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed. 749.

[12] *Riggins* v. *U. S.*, 199 U. S. 547, 26 S. Ct. 147, 50 L. ed. 303.

> every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one."

The approach of these petitioners is along the path of an appeal to elemental justice for correction of a wrong which is concealed, apparently without reported direct precedent, and yet as fundamental to petitioners' rights under the Constitution as it is important to the preservation of those principles of equal justice upon which our democratic concept of government depends for its principal foundation.

In Florida the liability of a railroad company for damages in a civil action is prescribed by statute.[13] It provides that such companies are liable for damage done to persons or property by the running of trains "unless the company shall make it appear that their agents exercised all ordinary care and diligence, the presumption in all cases being against the company." Under such a statute an alleged tortious act by the railroad company must be proved. This is to be accomplished, if at all, by no less convicing evidence than is required in the case of any other defendant.[14]

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[13] Sec. 768.05, Florida Statutes, 1941.

[14] "A state statute (Ga. Civ. Code, § 2780) declaring that a railroad company shall be liable for damages to person or property by the running of its trains, 'unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company,' which is construed by the courts of the state as permitting the presumption of negligence thereby created to be given the effect of evidence, to be weighed against opposing testimony, and to prevail unless such testimony is found by the jury to preponderate, is violative of the due process clause of the 14th Amend-

In a criminal action conviction is dependent upon an established measure of competent proof disclosing the ultimate facts necessary to establish guilt of the crime charged.[15] In a civil action a judgment for damages must likewise be squarely bottomed upon preponderant evidence of the negligent acts alleged, and as the established rules of evidence are applicable so likewise are the accepted judicial concepts of cause and effect.[16]

Upon this preliminary statement of fundamental law, petitioners contend that in the case at bar the Supreme Court of Florida has infringed upon their substantive rights under the Constitution and has deprived them of the equal protection of the laws.

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ment." *Western & A. R. Co.* v. *Henderson*, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed 884.

* * *

"Such a question must be determined from the evidence as any other fact in the case is determined. The jury has no arbitrary power to disregard uncontradicted evidence and place the blame upon the railroad company for the alleged injury." *S. A. L. R. Co.* v. *Myrick*, 91 Fla. 918, 109 So. 193.

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[15] "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition * * *. But alterations which do not increase the punishment nor change the ingredients of the offense *or the ultimate facts necessary to establish guilt* * * * relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure." *Hopt* v. *People of Utah*, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262.

[16] "(In order that damages may be recovered by any one so injured) *negligence of the railroad must have existed and must have been the proximate cause of the injury;* for, if the heedlessness and lack of prudence on the part of the party injured was the sole proximate cause of the injury, *he cannot recover however negligent the railroad company may otherwise have been.*" *S. A. L. R. Co.* v. *Smith*, 53 Fla. 375, 43 So. 235. See, also: *Florida C. & P. R. Co.* v. *Williams*, 37 Fla. 406, 20 So. 558; *S. A. L. R. Co.* v. *Myrick*, supra; *S. A. L. R. Co.* v. *Watson*, 94 Fla. 203, 113 So. 716; *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Brady* v. *Southern R. Co.*, 320 U. S. 476, 88 L. ed. 189.

In essence, the facts of the case are as simple as they are barren of the elements necessary to constitute actionable negligence. Petitioners operate a line of railroad engaged in intrastate and interstate commerce. At the town of Boynton Beach, Florida, the two principal grade crossings are protected by flashing automatic signals, motivated by electricity and set in operation when the electric circuit is closed by an approaching train. The installation of these automatic warning signals was considered necessary by petitioners because their railroad station constituted an obstruction to the view of motorists approaching the tracks.

Concerning this the Supreme Court of Florida in its opinion filed May 19, 1944, had the following to say:

> "Obviously the company had diligently tried to minimize (the) danger by the maintenance of an adequate signal system."

On March 29, 1943, at about 6 P. M., respondent's intestate, driving a truck, approached one of these protected crossings from the east. At the same time a troop train operated by petitioners was likewise nearing the crossing from the south. It was a through movement and not scheduled to stop at Boynton Beach. Its speed was approximately 65 miles per hour. On account of frequent use over a period of years deceased was entirely familiar with the physical situation and, as a matter of fact, had just concluded the delivery of a freight shipment to petitioners' station platform. As the train approached, it set the automatic flashing lights in operation. Confirming this the Supreme Court of Florida said:

> "There was abundant proof, too, that the signal lights were flashing."

In addition, the engineer in charge of the locomotive gave adequate warning of its approach. The Supreme Court of Florida said:

> "There was a preponderance of evidence however that the whistle was blown repeatedly as the train neared the scene and that the bell on the locomotive was ringing."

* * * * * * *

and

> "The engineer attempted further to lessen the danger in this particular instance by sounding the whistle and ringing the bell, * * *"

In addition to this wealth of warning, the Supreme Court of Florida recited the following fact:

> "No one denied the story of a traveler who approached (the crossing) from the opposite direction immediately before the mishap and who had an unobstructed view of the oncoming train, the truck, and the collision. He testified that the red signal light facing him on the west side of the track was functioning. He saw and heeded it *and made a frantic effort to warn the deceased of the impending danger.*"

Notwithstanding his thorough familiarity with the physical characteristics of the crossing and in spite of these warnings, the Court found that:

> "* * * deceased entered the danger zone, with which he was entirely familiar, heedless of the warnings being given by the train, the signal device, and the other traveler."

In the resulting collision, William Deal was instantly killed. Upon trial, the jury returned a verdict of $10,000 in favor of his widow, and final judgment thereon was affirmed by the Supreme Court of Florida.

In the case of *Chambers* v. *Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, this Court had occasion to review the judgment of the Supreme Court of Florida wherein the defendant had been convicted and sentenced to death upon a charge of murder.

In its decision in that case this Court invoked for Chambers the protection of the 14th Amendment. Its action in doing so was to correct what petitioners have characterized in this action as a "concealed infringement."

So far as the record was concerned, the State of Florida had properly indicted and arraigned Chambers, afforded him a public trial and the right of appeal from his conviction. Due process of law apparently characterized every step in the proceedings from his apprehension through affirmance of the judgment of the trial court by the Supreme Court of Florida.

But delving into the circumstances surrounding his conviction this Court exposed to the light of judicial review the fact that the sentence of death pronounced upon Chambers depended solely upon an alleged confession which had been obtained by methods reminiscent of Medieval (and present day Totalitarian) brutality and under conditions which bore no semblance to due process or equal protection of the laws.

That decision followed *Brown* v. *Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682, and the two cases marked a wider extension of the scope of the 14th Amendment than had hitherto been enunciated by this Court. It was as far reaching as it was beneficent to those litigants whose substantive rights under the Constitution are threatened by incursions of those in authority. In effect, this Court said that a person charged with crime must be convicted, if at all, upon facts which are competent to support the allegation of criminality. It held that constitutional methods and judicially recognized measures of proof are essential

to a judgment of conviction and that a man's life and liberty are not to be taken away upon a verdict of guilty not supported by sufficient facts to warrant this conviction.

Applying the legal principles laid down in the Brown and Chambers cases to the action at bar is not difficult even though the transition be from the criminal aspect to the civil side.[17]

By statutory enactment these petitioners were liable to respondent if and only if they failed to make it appear that "their agents had exercised all ordinary care and diligence." By frequent decisions of the Supreme Court of Florida in which it followed the universally recognized judicial concept of cause and effect, even if some act or omission on their part failed to meet the test of "all ordinary care and reasonable diligence," nevertheless, that act or omission had to be proximate and not a remote cause.

The Supreme Court of Florida found as a matter of fact that petitioners had exercised diligence by installing automatic signals, which were in operation, and that their agents operating the train had certainly exercised all ordinary care.

> "The engineer attempted further to lessen the danger in this particular instance by sounding the whistle (repeatedly as the train neared the scene) and ringing the bell."

and

> "When the engineer saw the truck perilously near the track he applied the emergency brakes and brought the train to a stop as quickly as he could without derailing it."

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[17] "The standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases." *U. S.* v. *Feinberg*, (C. C. A. 2), 140 Fed. (2) 592. Cf. *U. S.* v. *Andolschek*, (C. C. A. 2), 142 Fed. (2) 503.

Upon these admitted facts wherein lies actionable negligence under the statute? Three members of the Florida Supreme Court made the same query by their refusal to concur in the opinion of the other four.

If any answer was made it appears to be the conclusion of the majority that negligence was chargeable to petitioners "on account of the speed of the train at that particular point."

That reply, however, does not encompass sufficient facts to overcome either of the following:

First: Section 768.06, Florida Statutes, 1941, specifically denies recovery by one whose injuries, though caused by a railroad company, were "done by his consent or caused by his own negligence."

In its opinion the Florida Supreme Court said:

> "* * * yet Deal went on the track, not heeding these sounds if he heard and not paying attention to the warning of the other traveler, if he saw * * *"

and

> "* * * deceased entered the zone of danger, with which he was entirely familiar, heedless of the warnings being given by the train, the signal device, and the other traveler * * *"

A factual situation so described does nothing more nor less than invoke the statute above quoted. It would be difficult, if not impossible to conceive of a case wherein application of the maxim "volenti non fit injuria" would be more apt.

Second: The speed of the train had no proximate causal relation to the result.

Mere cursory consideration might lead to the conclusion that the speed of the train was a proximate cause upon one or all of three grounds: First, that the engineer might

have stopped his train but for the speed; second, that the truck driver might have escaped injury but for the severity of the impact caused by the momentum; and, third, that the collision might have been averted entirely if the speed of the train had been lower so that the truck could have got across the tracks and out of danger before the locomotive reached the crossing.

Mature reflection will demonstrate, however, that none of these propositions is legitimate.

1. *Inability to stop*

The facility with which most of us, including judges and jurymen, stop our automobiles has, perhaps, encouraged an erroneous impression on this subject as it relates to all moving objects. Because, by our own experience with automobiles, we calculate stopping distances in terms of feet, it is difficult to cast our thoughts, as a locomotive engineer must, in terms of the many hundreds of feet which even moderate train speeds require within which to stop. This is a physical fact which the Court knows and no person with reasonable intelligence would deny either the fact or his knowledge of it. A common sense corollary to this fact is the universally recognized principle that at highway crossings it is the automobile which is required to yield the right of way to the train. This rule obtains in Florida.[18] If this rule of law did not exist, transportation by rail with any degree of efficiency or dispatch would be an impossibility. An enginer required to operate his train at such a speed that he could always yield the right of way to motorists at grade crossings would be interminably delayed in reaching his destination.

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[18] *A. C. L. R. Co.* v. *Watkins*, 97 Fla. 350, 121 So. 95.

2. *Force of the impact*

By the same process of nontransposed reasoning, we are likewise unable adequately to comprehend the enormous difference between the destructive force of a relatively light automobile traveling at a comparatively slow speed and the crushing impact of a railroad train moving at a similar rate. The weight of an automobile is to pounds as the weight of a train is to tons and their relative potentials of destruction are at a similar ratio.

Thus it is that one who finds himself in the path of an oncoming train cannot expect the degree of his injuries to be in any proportion to the speed of the train. This is particularly true in this case because the evidence showed that the locomotive collided with the truck directly at the driver's seat and on his side. It can scarcely be concluded that in such a collision death would not have resulted if the train had been moving, for example, at 30 miles per hour.

3. *Escape ahead of the train*

This theory (tenuous at most) certainly cannot be advanced seriously here. The evidence disclosed without contradiction that Deal drove onto the tracks and stalled his engine. He might have escaped if he had jumped out of the truck when this happened. Instead, however, he was trying to save the truck (in disregard of his own safety) when the collision occurred. He was trying to back the truck off the tracks.

In short, there is no escape from the simple but conclusive proposition that the speed of this train was remote in its relation to the death of respondent's intestate.

The Supreme Court of Florida has several times enunciated the generally accepted rule that where a motorist goes heedlessly upon the tracks without looking or listen-

ing he cannot recover, his failure to look being the proximate cause and the mere speed of the train being a factor so remote as not to alter the rule.[19]

That principle is applicable to the instant case. The petitioners, realizing that their station building constituted an obstruction to view, installed the automatic signals so that their flashing lights in front of the motorist would eliminate the necessity for him to drive dangerously close to the tracks to see around the building. While they were not responsible for the presence of the traveler on the other side of the crossing, nevertheless, petitioners are as entitled to the advantage of his presence there and his "frantic effort to warn the deceased of the impending danger" as respondent is chargeable with her intestate's inexplicable failure to heed such warnings.

The locomotive engineer knew of the flashing lights, and to complement their warning he rang the bell and blew the whistle repeatedly as he neared the scene. Certainly he could not reasonably be expected to foresee that in complete and reckless disregard of all such warnings the truck driver would, nevertheless, venture upon the tracks.[20]

However lacking in direct precedent this petition may be, it is marked by the novelty of the situation wherein petitioners find themselves saddled with a judgment for $10,000.00 upon facts which so clearly absolved them of liability. The factual circumstances of the accident itself however, *are not* without a precedent and petitioners can best depend for judicial support of their contention upon

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[19] *Powell* et al. v. *Gary,* 146 Fla. 334, 200 So. 854, and cases cited therein. See, also, *Van Allen* v. *A. C. L. R. Co.,* (C. C. A. 5) 109 Fed. (2) 780.

[20] "It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee & St. P. R. Co.* v. *Kellogg,* supra.

the language of the Court of Appeals of Ohio in the case of *Shaffer* v. *New York Cent. R. Co.*, (1940) 66 Ohio App. 417, 34 N. E. 2d 792:

> "'* * * When the company had provided the signs, signals and warnings, it had at the crossing, did the exercise of ordinary care require it to so operate its train that it could be stopped before it got to the crossing if those in charge of it then saw something on the track there?
>
> "The last clear chance doctrine is not pleaded in the amended petition, nor is it claimed to be applicable in this case.
>
> "In their relation to the public, railroads serve a practical purpose,—the rapid transportation of persons and commodities. In this service speed is essential. Warning signs and signals such as existed at this time and place having been provided, those operating that train were warranted in assuming that the traveling public, having been informed of its approach, would yield to it the right of way over the crossing. If this is not true and such a train must keep its speed where it can be stopped in a few feet, the essential and practical purpose of railroads is lost.
>
> "The answer to this question is—No—and with this answer the judgment of the trial court is sustained on the lack of any evidence tending to prove negligence on the part of the defendant."

Conclusion.

The judgment in this case is for $10,000. That, in itself, is a sizable sum, but the principle of law as applied by the Supreme Court of Florida is so far reaching in its implications that these petitioners, as well as all other persons engaged in the business of operating railroads, are greatly endangered if the opinion of the Supreme Court of Florida is permitted to stand. If the railroad companies install automatic safeguards of modern design at grade crossings and in the operation of their trains afford motorists addi-

tional timely warnings by whistle and bell signals, and still can be held liable in damages, because a heedless driver goes blindly upon the tracks in the face of such warnings, then, as a practical matter, it becomes impossible for such a company ever adequately to defend itself in an action arising out of a railroad crossing accident regardless of what may be the circumstances. The courts constantly refer to "the conduct of an ordinarily cautious and prudent individual" as the index of what should be done in order to avoid a charge of negligence. In this case, aside from petitioners and their agents, whose actions have been characterized by the Supreme Court of Florida as diligent and careful, the only other person whose conduct meets the test is the *other* traveler at this crossing. He came up to it and in obedience to the automatic flashing lights, as well as the bell and whistle signals, stopped his automobile.[21] Thereafter seeing deceased in a position of imminent peril he made frantic efforts to warn him. These facts added to all of the others which obtain in this case constitute such an overwhelming indictment of the conduct of respondent's intestate that if she is entitled to damages for his death then no person injured in a crossing accident should be denied recovery.

The writ of certiorari should be granted.

Respectfully submitted,

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[21] If William Deal had so acted there would be no occasion for this proceeding.